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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 5196 of 1995

with

Civil Application No.2966 of 1997

with

Civil Application No.6760 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA.

1 Whether Reporters of Local Papers may be allowed

1. Whether Reporters of Local Papers may be allowed to see the judgements? - Yes.

2. To be referred to the Reporte

3. Whether Their Lordships wish to see the fair copy of the judgement?-No.

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?-No.

5. Whether it is to be circulated to the Civil Judge?—No.

DIAMOND STATE BANK STAFF CO OP HSG. SOC LTD

Versus

STATE OF GUJARAT

Appearance:

MR PM THAKKAR for Petitioner

GOVERNMENT PLEADER for Respondent No. 1, 2

CORAM : MR.JUSTICE R.BALIA.

Date of decision: 25/04/97

ORAL JUDGEMENT

While considering Civil Application No.2966 of 1997, the Special Civil Application itself has been

heard. Since the main application itself is being decided, I do not propose to deal with the Civil Application separately.

The petitioner is a Cooperative Housing Society, registered under the Gujarat Cooperative Societies Act on 20th September, 1972. It secured permission to acquire land for the purposes of constructing houses from the concerned authorities on 5.4.1973. It entered into seven Agreements to Sell between 16.3.1974 and 25.11.1974 with respective holders of land, detailed in Annexure 'B' dated 30th January, 1980, order under Section 20 of the Urban Land (Ceiling and Regulation) Act, 1976 (hereinafter called "The Act"). The holders of the land in question and the petitioner-Society moved the State Government under Section 20 of the Act for exempting the land in question from the provisions of Chapter III of the Act. That application was granted by order dated 30th January, 1980. The exemption was granted subject to terms and conditions specified in the order Annexure 'B'. Condition 9 envisaged that the Society shall complete the proposed construction within a period of two years. Thereafter, the land which remains vacant, exemption in respect thereof shall come to an end. It is not the issue between the parties that construction for one reason or other was not completed within the stipulated time and that exemption did not come to an end automatically, but depended upon making an order to that effect under sub-section (2) of Section 20 on finding breach of condition on the part of the person concerned. It is also not in dispute that the period during which proposed construction was to be completed was extended by the Competent Authority from time to time and last of such extension was granted on 16.9.1991 for a period of six months. Thereafter, on 24.8.1993, Competent Officer of the State Government issued show cause notice against proposed action of cancelling the exemption granted under Order dated 30th January, 1980. The foundation for issuing notice was stated to be site inspection carried on by the Officer on 6.5.1993, disclosing that it has not completed the proposed construction within the time permitted and whatever construction has been made is of flat type houses, which are without prior permission of the Government. Finally, by order dated 29th March, 1995, the exemption was withdrawn. Petitioner, in the first instance, applied for recalling the order and to make a fresh order after giving it an opportunity of hearing, which too was rejected vide communication dated 19.5.1995. In this petition, the petitioner challenges the order dated 29.3.1995, Annexure 'A'.

From the aforesaid facts, it is apparent that when the Act was made applicable to the State of Gujarat on its commencement on 7.2.1976, the land in question was a vacant land to be governed by the provisions of Chapter III of the Act in the hands of the then owners of the land. Section 20, which is a non obstante clause, empowers the State Government to exempt any vacant land from the provisions of Chapter III if it is satisfied either on its own motion or otherwise that having regard to the location of such land, the purpose for which such land is being proposed to be used and such other relevant factors as the circumstances of the case may require, it is necessary or expedient in the public interest so to do. Such exemption may be made subject to such conditions as may be specified in the order. Sub-section (2) of Section 20 envisages that if at any time the State Government is satisfied that any of the conditions, subject to which any exemption under sub-section (1) is granted, is not complied with by any person, it may withdraw the order by which such exemption was granted after giving a reasonable opportunity of being heard to such person for making representation against the proposed withdrawal. On withdrawal of the exemption, the provisions of Chapter III becomes applicable to the vacant land. From the provisions of Section 20, it is apparent that while conferring enabling power on the State Government to exempt any vacant land from the operation of Chapter III, where it is necessary or expedient in the public interest, it also specifically provides for withdrawal of such exemption on committing breach of condition by the person, who is subjected to fulfil such condition. The fact that order is required to be made for cancelling or for withdrawing the exemption has been subjected to the requirement of giving a reasonable opportunity to the person affected further makes it clear that withdrawal of exemption is neither automatic nor necessarily a consequence of breach of condition. That is a matter which rests within the discretion of the State Government to consider the reasons for non-fulfilment of the condition and thereafter, take decision whether to continue or withdraw with the exemption granted. In other words, procedural fairness and consideration of justice and fair play have been made part of the statutory requirement indicating legislative policy in that regard. Therefore, there cannot be a plea of inherent lack of jurisdiction in the Government about withdrawal of exemption once granted.

To the merit of the order, first contention has been that a reasonable opportunity of hearing has not been afforded to the petitioner and the order has been

made ex parte on the date when it is made. However, from the facts recorded in the order, which are not in dispute, the plea cannot be sustained. Notice was issued on 24th August, 1993. Leaving aside what has transpired between 24th August, 1993 and 12th July, 1994, which are not placed on record, the matter was adjourned on 12.7.1994, 11.8.1994, 2.9.1994, 18.10.1994, 22.11.1994, 29.12.1994 and 24.1.1995 for enabling the Society to file a reply in its defence to the show cause notice. Matter was lastly placed on 24.1.1995. On that day also, no reply was filed, no written submissions were made. It is a case in which it can well be said that the petitioner was afforded enough opportunities to file its reply and grounds in its support and against the proposed withdrawal of exemption, which it failed to avail. The duty cast upon the State functionary is to afford a reasonable opportunity of hearing and does not go beyond that. If one for whom reasonable opportunity is made available fails to avail of it, he cannot be heard to say about breach of principles of natural justice for want of opportunity of hearing. It may be noticed that the only reason for non-appearance on 24.1.1995, as disclosed in the application for recalling the order, has been that on the relevant date, the Officer concerned had been taken ill and could not attend. Suffice it to state that the petitioner is a registered Cooperative Society, having a juridical personality of its own and it acts through of individuals. The matter had already been adjourned at its instance for seven times over last six months without placing on record anything in support of its contentions and even on last date of hearing, which was refixed, it did not make any arrangement for its representation. The fact that one of its personnel had fallen sick does not absolve the suitor from its duty to take reasonable care in litigating to deploy alternative person, particularly when it must be assumed that when the Secretary concerned was ill in bed and the Society knew about its date of hearing, there was no reason for considering non-appearance of any body on the part of the Society as a sufficient cause for non-appearance. Challenge, therefore, on the ground of lack of reasonable opportunity must fail.

Coming to the merits of the order, it is urged by the learned counsel for the petitioner that on their own showing, the petitioners had sufficient cause for not making construction within the time allowed under the conditions of exemption for which extensions have been granted from time to time in favour of the petitioner. The condition of making construction within time prescribed is directory and not mandatory. Therefore, in

the facts and circumstances of the present case, when over 375 houses had already been constructed, occupied by respective members, and in view of the fact that as per inspection referred to in the order, certain constructions did exist even as on 6.5.1993, there was no justification for withdrawing the exemption on that ground.

A condition as to time within which housing construction was required to take place is directory in the sense that breach thereof cannot result in withdrawal of exemption automatically and does not make State Government powerless to extend time for such construction even if reasonable ground for doing so exists. It cannot be read directory in the sense that non-compliance thereof cannot result in any consequence beyond point of time. The question in such cases really is of exercise of power in a reasonable manner. In the present case to the extent the petitioner had made applications and shown reasonable cause for extension of time of completing construction, the State Government had granted his request from time to time, last being on 16.9.1991. That extension was granted only for a period of six months. No extension was ever sought thereafter. As per petitioner's assertion in the petition, the petitioner had submitted plan for approval before AUDA on 28.1.1992 and AUDA had approved its plan on 27.2.1992 for constructing 375 houses and thereafter, on 29.8.1993, notice, in pursuance of which the impugned order was made, was issued by the Government. Petitioner knew extension of time for constructing houses six months beyond 16.9.1991 does not exist. It had not obtained extension of time on expiry of six months from 16.9.1991 or thereafter. He did not apply for any extension, showing any reasonable ground for extension within the extended time or even upto the issuance of notice, requiring the State Government to apply its mind to the question of extending time on reasonable cause being shown. No such application was also moved during the pendency of the proceedings before the State Government for above one and half years. Nothing has been shown in this petition as well as to what prevented the petitioner from seeking extension of time and what were those existing grounds, on the basis of which such extension was claimed by him. Therefore, it cannot be said that the conclusion of the State Government about breach of condition is erroneous or decision has been reached in any unreasonable manner.

It was causing some concern that until exemption is withdrawn, it continues in force and during which

whatever construction has come into existence and occupied by respective members of the Society before withdrawal, what shall be the effect on their rights as a consequence of withdrawal of exemption. However, it was pointed out by the learned counsel for the respondents that in terms of condition Nos. 9 and 10 for non-fulfilment of the condition concerning construction within the stipulated period only that land is affected by withdrawal of the order, which remains vacant land as on that date and the land already coming under construction is not affected thereby. It was stated by Mr. Desai, learned Assistant Government Pleader, that the land over which the construction has already been completed or has come into existence until the date of withdrawal will remain unaffected by the withdrawal order and shall not be considered as a vacant land in future proceedings that could be and may be taken against the petitioner. Therefore, to the extent the petitioner has not been able to make construction even during the extended period or even until the order was withdrawn, the exercise of power by the State Government in withdrawing the exemption thereto cannot be said to be an unreasonable and arbitrary exercise of power in that regard.

It was then urged by the learned counsel for the petitioner that the other ground reflected in the order that existing construction as on the date of inspection had been constructed without prior sanction of the Government is not well-founded nor a relevant consideration for withdrawing the exemption. In this connection, it was also urged that, factually, the statement is also incorrect, in as much as, the petitioner had constructed the houses after obtaining permission from AUDA, the Competent Authority for the purpose, and if any breach thereof has been committed, it is breach of the permission granted by AUDA, for which the State Government under the Urban Land (Ceiling & Regulation) Act is not empowered to take proceedings.

The argument appears to be well-founded. No such breach was pointed out in notice to show cause. If notice in respect of that breach has not been given to the petitioner, it cannot be made the basis of the order, in as much as, otherwise the petitioner could have, in that event, shown a factual incorrectness or non-existence of the ground in that regard. Moreover, a condition envisaged under Clause 9 is construction over the land in question within the stipulated time, construction in accordance with the provisions of law

after obtaining appropriate permission from Competent Authority. Once the land for construction is approved by the Competent Authority in that regard and constructions thereafter have been made so far as condition No.9 of making construction is concerned, must be deemed to have been fulfilled. If there is any deviation in construction from the approved plan, that may be a bone of contention between the person making construction and authority approving the plan and may require consequential orders, if breach of such approval is found to be there by that authority. But, it cannot be a case of non-fulfilment of condition Nos. 9 and 10 of the exemption from the provisions of the ULC Act vide order dated 30th January, 1980.

However, since the order is founded on two distinct and independent grounds, one of which I have found to be sustainable, which alone is sufficient to sustain the order, this conclusion of mine does not affect the validity of the order.

It was then urged by the learned counsel for the petitioner that the petitioner is a Housing Cooperative Society, duly registered under the Co-operative Societies Act and lands held by it are exempt from the purview of Chapter III of the ULC Act under Section 19(1)(v) of the Act. Under Section 20, exemption has been granted to the vacant land held by the erstwhile owners of the land as on 17.2.1976, vide order dated 30th January, 1980 and thereafter, the petitioner had acquired title to the land validly in accordance with the provisions of the ULC Act during the currency of the exemption order, the validity of title to the land on the date of its acquisition by the petitioner-Society remained unaffected by withdrawal of exemption. This is further clear from the fact that provisions of Chapter III becomes applicable to such land on withdrawal of the certificate and not earlier thereto. Therefore, as on the date, when exemption certificate is withdrawn and land becomes amenable to the provisions of Chapter III, it is held by a Housing Cooperative Society and the lands held by the Housing Cooperative Society became exempted from the applicability of provisions of Chapter III under Section 19(1)(v), the withdrawal of exemption order should not affect the petitioner's interest in the land. In this connection, he places reliance on the decision of this Court in Chaitali Cooperative Housing Society Limited v. Competent Authority (ULC), 1996(3) GCD 155. Learned counsel for the State urges that the petitioner cannot derive any assistance from the said decision in as much as the said decision is subject matter of a Letters Patent Appeal and

operation of the order has been stayed.

The contention raised by the learned counsel for the petitioner relates to consideration of the vacant land after withdrawal of exemption certificate by Competent Officer. However, in what manner the land could be considered after exemption certificate once granted has been withdrawn is not the subject matter of this petition. I would, therefore, refrain from going into the merits of the contention in this regard. It will be for the petitioner to raise this issue as and when occasion for the same arises before the Competent Officer or other proceedings arising therefrom, to decide the issue.

It was lastly urged by the learned counsel for the petitioner that the petitioner has constructed on certain more land after making of the withdrawal order and after interim order was made in this Special Civil Application by the Court. Since the interim order speaks about construction to be made at the petitioner's own risk and costs, it would not be appropriate for this Court now to entertain this plea at this juncture. However, it will be open for the petitioner to make representation before the Government to consider the aspect of the matter about the applicability of Chapter III to the construction made over vacant land after withdrawal of application. That may also require consideration of the petitioner's plea to the applicability of Chapter III at all to it, as referred to above, to the Cooperative Society.

As a result of the aforesaid discussion, the petition fails and is hereby dismissed. Rule is discharged. Interim order stands vacated.

(apj)